FILED DATE :
AUG 31 2006

18

No. 05-1120

In the Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, ET AL., *Petitioners*

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

THOMAS F. REILLY
Attorney General of Massachusetts

LISA HEINZERLING
Special Assistant Attorney General
600 New Jersey Ave., N.W.
Washington, D.C. 20001

JAMES R. MILKEY*
WILLIAM L. PARDEE
CAROL IANCU
Assistant Attorneys General
1 Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
**Counsel of Record*

Attorneys for Petitioners
(Additional Counsel Listed on Signature Pages)

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency has authority to regulate air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act, 42 U.S.C. 7521(a)(1).

2. Whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1) of the Clean Air Act.

PARTIES TO THE PROCEEDING

Petitioners, who were petitioners in the court of appeals, are the Commonwealth of Massachusetts, the States of California (acting by and through Governor Arnold Schwarzenegger, the California Air Resources Board, and Attorney General Bill Lockyer), Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the District of Columbia, American Samoa Government, New York City, the Mayor and City Council of Baltimore, Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group.

Respondents are the Environmental Protection Agency (a respondent below), the Alliance of Automobile Manufacturers, National Automobile Dealers Association, Engine Manufacturers Association, Truck Manufacturers Association, CO_2 Litigation Group, Utility Air Regulatory Group, and the States of Michigan, Alaska, Idaho, Kansas, Nebraska, North Dakota, Ohio, South Dakota, Texas, and Utah (all intervenors below).

CORPORATE DISCLOSURE STATEMENT

The statement in the Petition for Certiorari remains accurate.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 1
Summary of argument 8
Argument:
I. EPA has authority to regulate air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act 11
A. The chemicals at issue here are "air pollutants" subject to regulation under section 202(a)(1) 12
B. EPA erred in finding, in failed bills and separate provisions of the Clean Air Act and other statutes, a congressional intent to forbid EPA to regulate air pollutants associated with climate change under section 202(a)(1) 20
C. EPA's interpretation deserves no deference .. 32
II. EPA may not decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1) of the Clean Air Act 35
A. The only relevant factor under section 202(a)(1) is whether air pollution from motor vehicles "may reasonably be anticipated to endanger public health or welfare" 35
B. The policy judgments EPA cited in refusing to regulate air pollutants associated with climate change were irrelevant under section 202(a)(1) or failed to take account of the statutory endangerment standard 39

Table of Contents—Continued: Page

C. Section 202(a)(1)'s reference to the Administrator's "judgment" does not give the Administrator unfettered discretion in deciding whether to regulate air pollution from motor vehicles 44
Conclusion 48

TABLE OF AUTHORITIES

Cases:

Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 126 S.Ct. 2455 (2006) 11
Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) 21, 22
Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon, No. 1:04 CV-06663-AWI-LJO (E.D. Cal.) 6
Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984) 17, 18, 32
Chickasaw Nation v. United States, 534 U.S. 84 (2001) .. 14
Clark v. Benitez, 543 U.S. 371 (2005) 17
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 37
Cook County, Ill. v. United States ex rel. Chandler, 538 U.S. 119 (2003) 23
Dept. of Hous. and Urban Dev. v. Rucker, 535 U.S. 125 (2002) 13
Diamond v. Chakrabarty, 447 U.S. 303 (1980) 13, 25
Dolan v. U.S. Postal Service, 126 S.Ct. 1257 (2006) 46
Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976) 42

Table of Cases—Continued: Page

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 4, 8, 12, 18, 19, 20, 21
FTC v. Ken Roberts, Co., 276 F.3d 583 (D.C. Cir. 2001) .. 30
General Motors Corp. v. NHTSA, 898 F.2d 165 (D.C. Cir. 1990) 35
General Motors Corp. v. United States, 496 U.S. 530 (1990) 38
Gonzales v. Oregon, 126 S.Ct. 904 (2006) 45
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999) 11
Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607 (1980) 41
In re Henderson's Tobacco, 78 U.S. 652 (1870) 23
Jama v. Immigration & Customs Enforcement, 543 U.S. 335 (2005) 37
J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124 (2001) 13, 31
Leocal v. Ashcroft, 543 U.S. 1 (2004) 46
Morton v. Mancari, 417 U.S. 535 (1974) 31
Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983) 38, 41
P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979) 14
Posadas v. Nat'l City Bank, 296 U.S. 497 (1936) 23
Pub. Citizen Health Research Group v. Chao, 314 F.3d 143 (3d Cir. 2002) 41
Pub. Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989) . 25
Russello v. United States, 464 U.S. 16 (1983) 37
S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 126 S.Ct. 1843 (2006) 14
SEC v. Chenery Corp., 318 U.S. 80 (1943) 41
Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506 (D.C. Cir. 1983) 41

Table of Cases—Continued: Page

Smith v. Allwright, 321 U.S. 649 (1944) 10
Solid Waste Agency of N. Cook County v. US Army Corps of Eng'rs, 531 U.S. 159 (2001) 21
Teamsters v. United States, 431 U.S. 324 (1977) 21
Thompson Med. Co. v. FTC, 791 F.2d 189 (D.C. Cir. 1986) 30
Union Elec. Co. v. EPA, 427 U.S. 246 (1976) 38
United States v. Craft, 535 U.S. 274 (2002) 21
United States v. Gonzales, 520 U.S. 1 (1997) 13
United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972) 37
United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980) 41
Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) 28, 38, 47

Statutes:

28 U.S.C. 1254 1
42 U.S.C. 6201 30
Clean Air Act, 42 U.S.C. 7401 *et seq.*:
Tit. I, 42 U.S.C. 7401 *et seq.*: 1
§ 101(b), 42 U.S.C. 7401(b) 35
§ 101(b)(1), 42 U.S.C. 7401(b)(1) 15
§ 103(a), 42 U.S.C. 7403(a) 33
§ 103(g), 42 U.S.C. 7403(g) 17,22
§ 103(g)(1), 42 U.S.C. 7403(g)(1) 16
§ 108-110, 42 U.S.C. 7408-7410. 27
§ 108(a), 42 U.S.C. 7408(a) 26
§ 108(a)(1), 42 U.S.C. 7408(a)(1) 29
§ 108(a)(1)(A), 42 U.S.C. 7408(a)(1)(A) 29, 46

Statutes—Continued: Page

§ 109(a), 42 U.S.C. 7409(a) 25, 46
§ 109(b)(1), 42 U.S.C. 7409(b)(1) 38
§ 109(b)(1)-(2), 42 U.S.C. 7409(b)(1)-(2) 46
§ 109(d), 42 U.S.C. 7409(d) 25
§ 111(a)(1), 42 U.S.C. 7411(a)(1) 36
§ 111(b)(1), 42 U.S.C. 7411(b)(1) 36
§ 111(b)(1)(A),
42 U.S.C. 7411(b)(1)(A). .15, 16, 26, 34, 35, 39,47
§ 111(d)(2)(B), 42 U.S.C. 7411(d)(2)(B) 37
§ 111(h)(1), 42 U.S.C. 7411(h)(1) 47
§ 111(j)(1)(A)(iv), 42 U.S.C. 7411(j)(1)(A)(iv) .. 37
§ 112(a)(1), 42 U.S.C. 7412(a)(1) 37
§ 112(b)(1), 42 U.S.C. 7412(b)(1) 26
§ 112(b)(2), 42 U.S.C. 7412(b)(2) 26
§ 112(b)(3)(B), 42 U.S.C. 7412(b)(3)(B) 26
§ 112(d), 42 U.S.C. 7412(d) 25
§ 112(f)(1)-(2), 42 U.S.C. 7412(f)(1)-(2) 24
§ 112(f)(1), 42 U.S.C. 7412(f)(1) 25
§ 112(f)(2)(A), 42 U.S.C. 7412(f)(2)(A) 37
§ 112(h)(1), 42 U.S.C. 7412(h)(1) 47
§ 112(r)(6), 42 U.S.C. 7412(r)(6) 24
§ 126, 42 U.S.C. 7426 27
§ 177, 42 U.S.C. 7507 6
§ 179B, 42 U.S.C. 7509a 29, 40
§ 188(e), 42 U.S.C. 7513(e) 40
Tit. II, 42 U.S.C. 7521 *et seq.*:
§ 202, 42 U.S.C. 7521 ..... *passim*
§ 202(a), 42 U.S.C. 7521(a) 25
§ 202(a)(1), 42 U.S.C. 7521(a)(1) 1, 2, 3, 10, 13,
15, 29, 30, 31, 36, 39, 41
§ 202(a)(2), 42 U.S.C. 7521(a)(2) 20, 36

Statutes – Continued: Page

§ 202(a)(4)(A), 42 U.S.C. 7521(a)(4)(A) 36
§ 202(b)(3)(C), 42 U.S.C. 7521(b)(3)(C) 31
§ 202(d)(2), 42 U.S.C. 7521(d)(2) 28
§ 209(a), 42 U.S.C. 7543(a) 28
§ 209(b), 42 U.S.C. 7543(b) 6,28
§ 209(c)(2)(B), 42 U.S.C. 7543(c)(2)(B) 36
§ 209(c), 42 U.S.C. 7545(c) 15, 26
§ 209(c)(1), 42 U.S.C. 7545(c)(1) 35, 39, 46, 47
§ 213(a)(3)-(4), 42 U.S.C. 7547(a)(3)-(4) 47
§ 214, 42 U.S.C. 7548 ..... 25, 46
Tit. III, 42 U.S.C. 7601 *et seq.*:
§ 301(g), 42 U.S.C. 7602(g) 1, 8, 12, 13
§ 302(h), 42 U.S.C. 7602(h) 2, 15
Tit. IV-A, 42 U.S.C. 7651 *et seq.*:
uncodified § 821, 42 U.S.C. 7651k 17
Tit. VI, 42 U.S.C. 7671 *et seq.*:
§§ 601-618, 42 U.S.C. 7671-7671q 26
§ 602(e), 42 U.S.C. 7671a(e) 22
§ 615, 42 U.S.C. 7671n 47
§ 618, 42 U.S.C. 7671q 34
Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392.. 24
Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 211(c)(1), 84 Stat. 1676. 26
Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690. 42
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 126, 91 Stat. 685. 27
Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 401, 91 Stat. 685, 791. 41

Statutes—Continued: Page

Energy Policy Act of 1992, Pub. L. No. 102-486, Title XVI, 106 Stat. 2776 23
Energy Policy and Conservation Act, 49 U.S.C. 32901 *et seq.*:
49 U.S.C. 32901-32919 ..... 29, 30
49 U.S.C. 32901(a)(3)(B) 30
49 U.S.C. 32901(a)(6) 31
49 U.S.C. 32902(a) 30
49 U.S.C. 32902(b) 30
49 U.S.C. 32902(f) 31
Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, Title XXIV, 104 Stat. 3359 23
Foreign Relations Authorization Act of 1987, Pub. L. No. 100-204, Title XI, 101 Stat. 1331 22
Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 23
National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 22
Pub. L. No. 86-493, 74 Stat. 162 (1960) 24
Veterans Affairs and HUD Appropriations Act of 1998, Pub. L. No. 105-276, 112 Stat. 2461 23

Federal Register:

38 Fed. Reg. 33734 (1973) 26
50 Fed. Reg. 9386 (1985) 26
59 Fed. Reg. 13044 (1994) 33
61 Fed. Reg. 9905 (1996) 34
63 Fed. Reg. 6426 (1998) 34
64 Fed. Reg. 10374 (1999) 33

Federal Register – Continued: Page

66 Fed. Reg. 7486 (2001) 3
66 Fed. Reg. 18245 (2001) 6
68 Fed. Reg. 52922 (2003) 3
69 Fed. Reg. 12151 (2004) 33
70 Fed. Reg. 15994 (2005) 27
70 Fed. Reg. 28606 (2005) 27, 40
71 Fed. Reg. 9866 (2006) 39

Miscellaneous:

105 S. Res. 98 (1998) 23
Energy Information Administration, Emissions of Greenhouse Gases in the United States 2004 (Dec. 2005) 40
H.R. Rep. No. 294, 95th Cong., 1st Sess. (1977) .. 32, 42, 45
H.R. 221, 106th Cong., §§ 3(b), 2(a)(2) (1999) 21
S. Rep. No. 54, 105th Cong., 1st Sess. (1998) 23

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A58) is reported at 415 F.3d 50. The order denying the petition for rehearing is reproduced at Pet. App. A98. The order denying the petition for rehearing en banc (Pet. App. A94-A95) and the dissenting statement on denial of rehearing en banc (Pet. App. A96-A97) are reported at 433 F.3d 66.

JURISDICTION

The court of appeals entered its judgment on August 15, 2005 (Pet. App. A99-A100). Petitions for rehearing and rehearing en banc were denied on December 2, 2005. The petition for a writ of certiorari was filed on March 2, 2006, and granted on June 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant sections of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are set forth at Pet. App. A101-A102.

INTRODUCTION AND STATEMENT

The statutory framework governing this proceeding is straightforward. Physical or chemical matter that is emitted into the ambient air is an "air pollutant" under the Clean Air Act. 42 U.S.C. 7602(g). The Administrator of the Environmental Protection Agency (EPA) "shall" set standards for air pollutants emitted by new motor vehicles when, in the Administrator's judgment, they "cause, or contribute to, air pollution which may reasonably be anticipated to endanger

public health or welfare." 42 U.S.C. 7521(a)(1). "Climate" and "weather" are components of "welfare." 42 U.S.C. 7602(h).

Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are physical and chemical matter. They are emitted into the ambient air by motor vehicles. A prodigious amount of scientific evidence indicates that they are changing our climate. Several parties asked EPA to regulate these chemicals under section 202(a)(1) of the Clean Air Act because they are "air pollutants" that "may reasonably be anticipated to endanger public health and welfare."

EPA denied the petition. Its decision rested on two fundamental errors of law. First, EPA concluded that it had no authority under section 202(a)(1) to regulate air pollutants associated with climate change, and that therefore the chemicals at issue here are not "air pollutants" within the meaning of the Act. Second, the agency decided that even if it had such authority, it would not exercise it, on account of various ad hoc policy considerations not enumerated in section 202(a)(1). The same mistake dooms both legal conclusions: EPA distorted two statutory terms ("air pollutant" and "judgment") and ignored a third ("welfare") in order to inject its own policy preferences into a statute that does not embody them.

EPA's misguided legal conclusions diverted it from the serious scientific inquiry at the heart of section 202(a)(1). Section 202(a)(1) requires the EPA Administrator to set standards for air pollutants emitted by new motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). EPA did not apply that standard, and it denied the petition without deciding whether carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons may, due to their effects on climate, reasonably be anticipated to endanger public health or welfare. To the extent the agency mentioned the science of climate change at all, it provided little more than a bullet-point list of scientific issues that remain incompletely resolved.

Petitioners ask this Court to correct EPA's legal errors and to remand the case to the agency with directions to apply the correct legal standard to this matter; that is all. A judgment in favor of petitioners will not mandate regulation of air pollutants associated with climate change, nor will it dictate a particular answer to the question whether such pollutants are endangering public health or welfare. It will, however, ensure that the question whether to regulate these pollutants is evaluated according to the legal standard set forth in the Clean Air Act.

I. Proceedings Before EPA

In 1999, the International Center for Technology Assessment and other parties petitioned EPA to set standards for four chemicals emitted by new motor vehicles: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. The petition asserted that, due to effects on climate, motor vehicles emitting these chemicals cause or contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare" within the meaning of section 202(a)(1) of the Clean Air Act, 42 U.S.C. 7521(a)(1).

In 2001, EPA requested public comment on the petition. 66 Fed. Reg. 7486 (2001). The agency received nearly 50,000 public comments. Pet. App. A63.

In 2003, EPA denied the petition. 68 Fed. Reg. 52922 (2003). In explaining its decision, the agency announced, first, that the Clean Air Act "does not authorize regulation to address global climate change," Pet. App. A67, and that therefore air pollutants associated with climate change "are not air pollutants under the [Act's] regulatory provisions. . . ." *Id.* at A78. EPA adopted the legal conclusions set forth in a memorandum written by Robert E. Fabricant, then EPA's General Counsel, reversing the legal conclusions reached by two previous General Counsels. *Id.* at A68-A69.

In offering this interpretation of the term "air pollutant," EPA turned away from the language of the statutory

provisions in question and instead relied on failed legislative proposals to address climate change; statutory provisions (in the Clean Air Act and elsewhere) addressing climate change in a "nonregulatory" fashion; and an asserted tension between regulation of air pollutants associated with climate change and the regulatory structure of the Clean Air Act and Energy Policy and Conservation Act. Pet. App. A69-A75, A79-A80. Citing the "economic and political significance" of the issue of climate change, EPA pronounced itself "urged on" in its legal judgment by this Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Pet. App. A76.

As a separate basis for its decision—discussed in a section entitled "Different Policy Approach"—EPA stated that it "disagrees with the regulatory approach urged by petitioners," and that it would not be "effective or appropriate for EPA to establish GHG [greenhouse gas] standards for motor vehicles at this time." Pet. App. A82. In place of the regulatory program created by section 202 of the Clean Air Act, EPA offered "near-term voluntary actions and incentives" and "programs aimed at reducing scientific uncertainties and encouraging technological development." *Ibid.*

EPA preferred a "different policy approach" for several reasons. First, noting that "[t]he science of climate change is extraordinarily complex and still evolving," Pet. App. A83, the agency trotted through a list of issues that remain inconclusively resolved. *Id.* at A83-A85. EPA relied primarily on selective quotations from a 2001 report by the National Research Council, *id.* at A82-A84, disregarding, among many others, that report's important opening sentence: "Greenhouse gases are accumulating in Earth's atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise." J.A. 151.

Second, EPA concluded that regulation under section 202 was not warranted because it would "result in an inefficient, piecemeal approach to addressing the climate change issue," since motor vehicles are one of many sources of air pollutants associated with climate change. Pet. App. A82.

Third, EPA asserted that "[u]nilateral EPA regulation" on this matter could "weaken U.S. efforts to persuade key developing countries to reduce the GHG intensity of their economies." Pet. App. A86. Regulation of air pollutants associated with climate change "raises important foreign policy issues," EPA observed, which it is "the President's prerogative" to address. *Ibid.*

Finally, EPA expressed uncertainty about the availability of technologies to address the emissions at issue. Pet. App. A87.

"In light of [these] considerations," EPA announced, the agency "would decline the petitioners' request to regulate motor vehicle GHG emissions even if it had authority to promulgate such regulations." Pet. App. A86.

II. The Court of Appeals' Decision

Petitioners sought review of EPA's decision in the D.C. Circuit. Petitioners in the court of appeals (and here) include twelve States, three U.S. cities, an American territory, and various public health and environmental organizations. Their interest in this case, detailed in affidavits filed in the court of appeals, arises from the profound harms that they assert are being and will be visited upon them as a result of climate change. The effects of climate change which petitioners have asserted (and which EPA has not denied) include the inundation of an appreciable portion of coastal States' property;[1] damage to publicly owned coastal facilities and infrastructure;[2] additional emergency response costs caused by more frequent and intense storm surges and floods;[3] and

---

[1] *See* Jacqz Decl. ¶¶ 10-11; Kirshen Decl. ¶¶ 5-11; Woodward Decl. ¶ 6; Dickson Decl. ¶¶ 6-10; Conrad Decl. ¶¶ 10, 12. The declarations cited here and in the next three footnotes were part of the record in the court of appeals, a copy of which is on file with the Clerk.

[2] *See* Hoogeboom Decl. ¶¶ 4-7; Morrison Decl. ¶¶ 5, 15-16; Conrad Decl. ¶¶ 10-11; Belensz Decl. ¶¶ 7-8.

[3] *See* Tommaney Decl. ¶¶ 13-14; Roos Decl. ¶ 15.

shrinking water supplies due to reduced snowpack.[4] Moreover, some of the environmental effects of climate change (such as exacerbation of ozone pollution) will make it more difficult for States to meet their existing obligations under the Clean Air Act. *See* 66 Fed. Reg. 18245, 18246 (2001) ("[s]tate governments will be affected by the environmental impacts of climate change" because of the increased number of ozone exceedances that will result).[5]

The appeals court panel split three different ways. Judge Randolph authored the court's lead opinion and announced its judgment. Assuming without deciding that the Administrator had authority to regulate air pollutants associated with climate change, Judge Randolph voted to uphold the agency's decision based on its "'policy' considerations." Pet. App. A13-A15. Judge Randolph found that section 202(a)(1)'s reference to the Administrator's "judgment" gave the agency broad enough discretion to make a decision based on "the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area." *Id.* at A13. These considerations included but were not limited to the existence of uncertainty. "It is . . . not accurate to say . . . that

---

[4] *See* Fawcett Decl. ¶ 6.

[5] EPA's decision also threatens to have ripple effects on California's and other States' sovereign power to enforce State laws. Automobile manufacturers are challenging a California law regulating the motor vehicle emissions at issue here, alleging that the EPA ruling in this case "precludes California from adopting any new motor vehicle emission standards for carbon dioxide or greenhouse gases." First Amended Complaint, ¶ 123, *Cent. Valley Chrysler-Jeep, Inc. v. Witherspoon*, No. 1:04-CV-06663-AWI-LJO (E.D. Cal.), available at http://pacer.psc.uscourts.gov. California is the only state allowed to set its own motor vehicle emission standards. *See* 42 U.S.C. 7543(b). Other states may adopt such standards if they are, among other things, "identical to" California's standards. 42 U.S.C. 7507. Ten States have done so, and automobile manufacturers have also sued two of them, Rhode Island and Vermont. For discussion, see Brief of the State of Arizona, *et al.*, as Amici Curiae in Support of Petitioners.

the EPA Administrator's refusal to regulate rested entirely on scientific uncertainty . . . ." *Id.* at A14-A15. Judge Randolph concluded that section 202(a)(1) "does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence." *Id.* at A13. According to Judge Randolph, other "'policy' considerations"—concerns about piecemeal regulation, worries about effects on international treaty negotiations and technological feasibility, and a preference for alternative voluntary approaches—were all factors that the agency was entitled to consider in coming to a decision. *Id.* at A14.

Judge Sentelle dissented in part, while concurring in the judgment. Because what he called the "phenomenon known as 'global warming'" was "harmful to humanity at large," Judge Sentelle thought it was "impossible" to establish standing to adjudicate petitioners' legal claims; the grievance was too generalized to support standing. Pet. App. A18. He nevertheless joined in Judge Randolph's judgment denying the petitions for review on the merits to ensure that a majority supported the denial of the petition. *Id.* at A19-A20.

Judge Tatel dissented. In his dissent, he first described why petitioners had satisfied the requirements for Article III standing. Noting that only one petitioner need have standing, Judge Tatel focused on Massachusetts and found that petitioners had offered unrebutted expert testimony that there was a substantial probability that Massachusetts would suffer "serious loss of and damage to" its coastal property. Pet. App. A27. He also found that petitioners had offered evidence that the harms they described were caused by air pollutants associated with climate change and that the relief they sought would redress their injuries. *Id.* at A28-A29.

On the merits, Judge Tatel (the only panel member to reach the question of EPA's authority) concluded that EPA plainly had statutory authority to regulate air pollutants associated with climate change and that its decision not to regulate these pollutants rested on policy considerations that

fell outside the range of discretion delegated by Congress. Pet. App. A21-A58.

By a vote of 2-1, the panel denied rehearing (Pet. App. A98), and by a vote of 4-3, the D.C. Circuit denied en banc review (Pet. App. A94-A95).

SUMMARY OF ARGUMENT

The language of the Clean Air Act dictates a ruling in petitioners' favor. Perhaps that is why EPA did everything it could to avoid the statutory text relevant to this case. In place of careful analysis of the text, structure, and history of the Act, EPA offered a farraginous list of reasons why it was declining to do what the statute so plainly tells it to do. Here, however, there is no strength in numbers; while the agency's reasons may be many, they do not add up to a persuasive whole. And, individually, they are weak indeed.

I. EPA's first legal error was to conclude that physical and chemical compounds associated with climate change and emitted into the ambient air by motor vehicles are not "air pollutants" within the meaning of the Clean Air Act and thus may not be regulated under section 202(a)(1) of the Act.

A. All of the pollutants at issue here fit easily within the Act's definition of "air pollutant," which "includ[es] any physical, chemical . . . substance or matter which is emitted into . . . the ambient air." 42 U.S.C. 7602(g). To conclude otherwise, EPA engaged in a host of interpretive don'ts: it ignored statutory language, inverted the usual meaning of other language, interpreted the same words to mean different things, and shrugged off Congress's explicit determination that an effect on climate is an important component of human welfare. This Court's decision in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), does not support EPA's unprincipled departure from the statutory text. In *Brown & Williamson*, the Food and Drug Administration (FDA) had disclaimed authority to regulate tobacco for sixty years, and Congress had enacted tobacco-specific legislation on the basis

of FDA's repeated disclaimers. Moreover, this Court found, regulation of tobacco under the Food, Drug, and Cosmetic Act would have led to an outright ban on tobacco, a result flatly inconsistent with Congress's expressed intentions. None of these circumstances is present here.

B. In deciding that air pollutants associated with climate change may not be regulated under the Clean Air Act, EPA relied on "indicia of congressional intent" such as failed legislative proposals and various subsequent enactments that are silent on and fully consistent with the provisions at issue here. This Court has made plain that it will not effectively repeal a statutory provision based on indicia such as these. Moreover, two other Clean Air Act programs to which EPA points—the program addressing stratospheric ozone depletion and that establishing ambient air quality standards—comfortably coexist with regulation of air pollutants associated with climate change under section 202(a)(1). Nothing in the program addressing ozone-depleting substances suggests that EPA may not regulate air pollutants associated with climate change under section 202(a)(1). Likewise, to say, as EPA has, that air pollutants associated with climate change may not be regulated under the mobile source program because they may not be appropriate for regulation under the separate National Ambient Air Quality Standards (NAAQS) program is to utter a *non sequitur*. Finally, the Energy Policy and Conservation Act (EPCA) is not inconsistent with regulation of air pollutants associated with climate change under section 202(a)(1) of the Clean Air Act. Nothing in EPCA expressly undoes any category of regulation under the Clean Air Act. On the contrary, both of these laws were written with respectful attention to the other.

C. Even if the statutory language were not plain, EPA's interpretation deserves no deference. Indeed, EPA has not in fact offered an *interpretation* of the language at issue here; it has merely offered a bottom-line conclusion that air pollutants associated with climate change may not be regulated under the Clean Air Act. This conclusion, moreover, conflicts with

other EPA decisions under the Act. An interpretation that is "good for this day and train only"[6] is not one that deserves judicial deference.

II. EPA's second legal error was to conclude that it could decline to regulate air pollutants associated with climate change under section 202(a)(1) on the basis of factors not enumerated in that provision.

A. The regulatory mandate of section 202 is triggered by a conclusion that motor vehicles cause or contribute to air pollution which "may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). Endangerment is the only factor mentioned in section 202(a)(1). Other provisions of section 202, which set forth the criteria for the content of the regulations triggered by a determination of endangerment, specify additional factors for the agency to consider at that stage. Much of the Clean Air Act, in fact, takes the same basic form: regulation is initially triggered by a finding of endangerment to public health or welfare, and the content of regulation is shaped by reference to numerous other factors. EPA was wrong to insert factors beyond endangerment into the carefully circumscribed framework of section 202(a)(1).

B. The text of the Clean Air Act makes plain that three of the policy concerns cited by EPA in declining to regulate air pollutants associated with climate change are irrelevant to section 202(a)(1). The fourth, scientific uncertainty, is relevant, but EPA failed to relate it to the statutory standard of endangerment.

C. Section 202(a)(1)'s reference to the "judgment" of the Administrator does two simple things: it specifies who is to make the determination regarding endangerment, and it makes clear that the Administrator is expected to exercise his expertise on the issues of environmental science and public health and welfare on which the provision turns. From the statutory text, it is plain that the "judgment" Congress called

---

[6] *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

upon relates only to the Administrator's determination whether a given pollutant causes or contributes to pollution that endangers the public health or welfare. What the word "judgment" does *not* do is allow EPA to smuggle into this provision factors otherwise left out of it. To hold that allowance for "judgment" on the part of the Administrator—a feature present throughout the Clean Air Act, as well as in untold numbers of provisions in the United States Code—gives the Administrator unfettered discretion to regulate or not, as he sees fit and without regard to statutory text, would be to effect a radical transfer of authority from Congress to the executive branch.

ARGUMENT

I. EPA HAS AUTHORITY TO REGULATE AIR POLLUTANTS ASSOCIATED WITH CLIMATE CHANGE UNDER SECTION 202(a)(1) OF THE CLEAN AIR ACT.

In concluding that the Clean Air Act "does not authorize regulation to address global climate change," Pet. App. A67, EPA first decided what the statute meant and then bent the statutory language to fit the agency's predetermined meaning. Rather than beginning with the language of the statute, as this Court's precedents invariably instruct, *see, e.g., Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S.Ct. 2455, 2459 (2006); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), the agency instead began by describing *other* alleged "indicia of congressional intent," Pet. App. A69, including the "political significance" of the issue of climate change. *Id.* at A78. Only after the agency had persuaded itself—through means other than examination of the text of the statutory provisions at issue here—that the statute could not have been meant to authorize regulation of air pollutants associated with climate change, did the agency turn to the language of the statute. This is not the way statutory interpretation is supposed to work.

The proper approach to discerning the Clean Air Act's meaning reveals that carbon dioxide and other air pollutants associated with climate change fit exactly within the Act's definition of "air pollutants." Nothing in the one decision on which EPA relied, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), gives EPA a free pass to ignore statutory text. EPA's attempts to circumvent the straightforward meaning of the statutory language—through appeals to subsequent failed legislative proposals and other discredited "indicia" of congressional intent—turn this Court's approach to interpreting statutes inside out.

A. The chemicals at issue here are "air pollutants" subject to regulation under section 202(a)(1).

1. In concluding that air pollutants associated with climate change are not "air pollutants" within the meaning of the Act, EPA managed both to ignore and to distort the plain text of the statute.

Section 302(g) defines the critical term "air pollutant":

> The term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air.

42 U.S.C. 7602(g). Motor vehicles *emit* the *physical* and *chemical matter* carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons *into the ambient air*. No one involved in these proceedings has ever questioned these incontestable facts, which place these chemicals squarely within the ambit of the statutory definition of "air pollutants."

Closer parsing of the statutory text only bolsters this conclusion. The use of the word "any" in section 302(g)—not once, but twice: "any" air pollution agent, "any" physical or

chemical substance or matter—bespeaks breadth.[7] As this Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Dept. of Hous. and Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); *see also, e.g., J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130 (2001) ("In choosing such expansive terms . . . , modified by the comprehensive 'any,' Congress plainly contemplated that the [statutory provision] would be given wide scope.") (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980)).

EPA's interpretation of the term "air pollutant" is at odds with section 302(g)'s use of the word "any." EPA asserted that "a substance does not meet the CAA [Clean Air Act] definition of 'air pollutant' *simply because* it is a 'physical, chemical, biological, radioactive * * * substance or matter which is emitted into or otherwise enters the ambient air.' It must also be an 'air pollution agent.'" Pet. App. A79 n.3 (emphasis added). To accept EPA's view would be to rewrite the statutory language, changing it from "*any* physical, chemical, biological, radioactive . . . substance or matter" to the very different phrase "*some* physical, chemical, biological, radioactive . . . substance[s] or matter." But that is not what the statute says.

In addition, EPA's interpretation inverts the meaning of the word "including." Section 302(g) states, "[t]he term 'air pollutant' means any air pollution agent or combination of such agents, *including* any physical, chemical, biological, radioactive . . . substance or matter." 42 U.S.C. 7602(g) (emphasis added). In suggesting that some "physical, chemical, biological, radioactive * * * substance[s] or matter" are not "air pollution agent[s]," Pet. App. A79 n.3, EPA

---

[7] Section 202(a)(1) also signals breadth: it applies to "*any* air pollutant" emitted from "*any* class or classes of new motor vehicles or new motor vehicle engines" which meet the standard of endangerment. 42 U.S.C. 7521(a)(1) (emphasis added).

implied that the class of "air pollution agents" is *smaller* than the class of "physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." However, the use of the word "including" indicates that "air pollution agent" is, if anything, to be given a more spacious, not more cramped, meaning than the words that follow it. "To 'include' is to 'contain' or 'comprise as part of a whole.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (quoting Webster's Ninth New Collegiate Dictionary 609 (1985)).[8] Thus, an "air pollution agent" is the "whole" of which "any physical, chemical, biological, radioactive . . . substance or matter" is a "part."

Petitioners' reading also does justice to the word "agent." Congress chose to include within the category of "air pollutants" not merely the "substance[s] or matter" that might comprise air pollution, but also other "agents" of air pollution. These agents could include phenomena that, unlike "substance[s] or matter," have no mass (including, for example, heat and certain types of ionizing radiation, such as ultraviolet, gamma, and X-rays). Such phenomena could be "agents" of air pollution even though they are not "substance[s] or matter." Thus, far from having a constrictive effect on the phrase following the word "including," the use of the term "air pollution agent" indicates applications of the Act to phenomena not embraced by the "including" clause.

---

[8] *See also S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S.Ct. 1843 (2006) (provision stating that "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants" held to mean that "discharge" was broader than the terms following "includes"); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 77 n. 7 (1979) (in provision defining "employee" to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations," the word "including" was interpreted "to indicate that 'longshoring operations' are a part of the larger group of activities that make up 'maritime employment'").

The text of the Act also makes clear that including air pollutants associated with climate change under the statutory rubric of "air pollutants" comports with Congress's legislative aims. The basic purpose of the Clean Air Act is to protect public health and welfare. 42 U.S.C. 7401(b)(1). Adverse effects on public health and welfare are the key triggers for regulation under the Act. *See, e.g.*, 7411(b)(1)(A) (stationary sources), 7521(a)(1) (motor vehicles), 7545(c) (fuels and fuel additives). Here is the Act's definition of "welfare":

> All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, *weather*, visibility, and *climate*, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being, whether caused by transformation, conversion, or combination with other air pollutants.

42 U.S.C. 7602(h) (emphasis added). EPA's view that the Clean Air Act "does not authorize regulation to address concerns about global climate change," Pet. App. A78, is completely at odds with the concern for effects on climate and weather, explicit in this provision. It would be strange indeed for Congress to conclude, so pointedly, that climate and weather are important components of human welfare, yet to deprive EPA of authority to do anything about the pollutants that most affect these features of our environment. EPA's notion that "air pollution" excludes airborne matter that produces effects expressly included in the Act's key phrase ("public health or welfare") is untenable.

Indeed, even absent the express references to "climate" and "weather" in the definition of the pivotal term "welfare," section 302(h) would nevertheless signal congressional concern with the kinds of harms posed by air pollutants associated with climate change. Climate change either triggers or exacerbates every one of the effects listed in section 302(h). EPA's stingy interpretation unjustifiably shrinks the agency's

capacity to respond to effects that Congress has undeniably directed it to address.

What is more, EPA is attempting to accomplish this shrinkage through a statutory phrase—"air pollutant"—that gives no hint of such a repercussion. Instead, the natural reading of this term, the one that hides no elephants in mouseholes, is that it describes the large class of substances and phenomena that could potentially lead to regulation under the Act. While the Act defines "air pollutant" broadly, emissions of air pollutants are actually *regulated* only when the agency concludes that they may reasonably be anticipated to endanger the public health or welfare. *See, e.g.*, 42 U.S.C 7411(b)(1)(A) (new stationary sources); 7521(a)(1) (new motor vehicles). Interpretation of the phrase "air pollutant" in accordance with the plain language of the statute will thus cause no untoward regulatory results. EPA's General Counsel erred in suggesting that reading section 302(g)'s language as written would lead to the regulation of "virtually anything entering the ambient air . . . ." J.A. at 135 n.9.

EPA's interpretation also errs in giving no weight to the Act's explicit inclusion of carbon dioxide within a list of "air pollutants." Section 103(g) directs EPA to conduct a research program concerning "[i]mprovements in nonregulatory strategies and technologies for preventing or reducing multiple *air pollutants*, including . . . *carbon dioxide* . . . ." 42 U.S.C. 7403(g)(1) (emphasis added).

EPA attempted to avoid the import of this plain text by asserting a dichotomy between "regulatory" and "nonregulatory" programs under the Act and asserting that the Act bars only "regulatory" activities with respect to air pollutants associated with climate change. EPA stated that "GHGs, as such, are not air pollutants under the CAA's *regulatory* provisions, including sections 108, 109, 111, 112 and 202," and that "the term 'air pollution' *as used in the regulatory provisions* cannot be interpreted to encompass global climate change." Pet. App. A78 (emphasis added). On this theory, research on climate change conducted pursuant to section

103(g), 42 U.S.C. 7403(g), comports with EPA's interpretation because such activity is not "regulatory." Pet. App. A71; *see also* J.A. 136 (Fabricant memorandum). Yet research under section 103(g) relates to "air pollution," which EPA has said does not include climate change. Pet. App. A78.

Nothing in the language of the Act allows the phrase "air pollutants" to bear the double meaning EPA seeks to give it. Section 302(g) does not, in defining "air pollutants," give any hint that the reach of this phrase depends on whether a statutory program is "regulatory" or not. As in *Clark v. Benitez*, 543 U.S. 371, 378 (2005), "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one."

Moreover, the Act does not even provide any basis for distinguishing actions that are "regulatory" in EPA's sense from ones that are not. EPA suggests that section 821 of the 1990 Amendments, requiring utilities subject to the Clean Air Act's acid rain control program to monitor and report their carbon dioxide emissions, is not a regulatory provision.[9] *See* Pet. App. A70 (stating that section 821 does not "authorize[] the imposition of mandatory requirements"). It is hard to understand what EPA means by "regulatory" or "mandatory" requirements if government-dictated monitoring and disclosure do not come within their terms. Certainly nothing in the Clean Air Act creates or clarifies this division, further confirming that the Act does not permit different definitions for the term "air pollutants" depending on the nature of the statutory program at issue.

In sum, a straightforward reading of the language of the Clean Air Act shows that carbon dioxide and other air pollutants associated with climate change are "air pollutants" potentially subject to regulation under section 202(a)(1). When Congress has spoken as plainly as it has here, an administrative agency is bound to obey that legislative

---

[9] Section 821 is uncodified; it appears as a note to section 412 of the Clean Air Act, 42 U.S.C. 7651k.

command. *See, e.g., Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984).

2. EPA has tried to avoid the import of the statutory text by relying on a single case, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). EPA read *Brown & Williamson* to stand for the proposition that "in extraordinary cases" facially broad grants of authority must undergo more rigorous scrutiny to decide whether Congress really meant what it said. Pet. App. A76. EPA asserted that just as this Court found Congress did not intend the FDA to regulate tobacco as a "drug" under the Food, Drug and Cosmetic Act (FDCA), so Congress did not intend EPA to regulate greenhouse gases as "air pollutants" under the Clean Air Act. *See id.* at A76-A78. EPA suggested that this case is even more "extraordinary" than *Brown & Williamson*, asserting that regulation of air pollutants associated with climate change "would have far greater economic and political implications than FDA's attempt to regulate tobacco." *Id.* at A76. But this case is worlds away from *Brown & Williamson*.

First, *Brown & Williamson* begins with the reminder that "although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing 'court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" 529 U.S. at 125-126 (quoting *Chevron*, 467 U.S. at 842-843). The intent of Congress in section 202(a)(1) of the Clean Air Act is, as we have demonstrated, unambiguous, and nothing in *Brown & Williamson* justifies EPA's departure from that plain intent.

Second, in *Brown & Williamson*, the Court found it determinative that for more than sixty years the FDA had asserted that it had no authority to regulate tobacco under the FDCA, and that Congress had repeatedly enacted tobacco-specific legislation that ratified and was explicitly based on the FDA's longstanding interpretation. 529 U.S. at 154-157. Here, in contrast, before the decision at issue in this case, EPA had never suggested that it lacked authority to regulate air pollutants associated with climate change, and Congress has

enacted no legislation premised on the agency's disclaimer of jurisdiction. In fact, prior to its decision here, EPA had taken the opposite position. In response to congressional inquiries, two EPA general counsels stated that the Clean Air Act *does* provide authority to regulate carbon dioxide. *See* J.A. 46-118. In contrast to the tobacco-specific legislation cited in *Brown & Williamson*, the climate-specific legislation cited by EPA in support of its decision, *see* Pet. App. A69-A71, A74-A75, was not enacted in response to any denial of authority by EPA. In addition, as EPA itself hastened to point out, the climate-specific legislation it cited does not mandate emission reductions. Thus, this legislation does not, as in *Brown & Williamson*, create a regulatory regime that might compete with, or be in tension with, an agency-administered regulatory program.

Third, *Brown & Williamson* stressed that if the FDCA applied to tobacco, it would allow only one result: a total product ban. 529 U.S. at 137. The Court noted that an outright ban would be inconsistent with the half-dozen other tobacco-specific enactments that were all premised on tobacco's remaining legally for sale. *Id.* at 143-144. Because Congress had enacted legislation that was completely at odds with subjecting tobacco to FDCA jurisdiction, the Court declined to conclude that cigarettes were "drugs" or "devices" under that statute. It was in this "extraordinary" context that the Court stated that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 159, 160. In contrast, regulating air pollutants associated with climate change under section 202 would assuredly not lead to a ban on motor vehicles or substantial economic dislocation, but would result instead in EPA's setting economically and technologically feasible emission standards for them—

something the agency has done for decades for other pollutants emitted by motor vehicles.[10]

In short, this case presents none of the circumstances described by *Brown & Williamson* as "extraordinary." In the end, applying the principles of *Brown & Williamson* to this case yields the same overall conclusion the Court reached there: that Congress "has directly spoken to the issue," and the agency is not free to rewrite the statute simply because it now disagrees with the policy that Congress enacted.

B. EPA erred in finding, in failed bills and separate provisions of the Clean Air Act and other statutes, a congressional intent to forbid EPA to regulate air pollutants associated with climate change under section 202(a)(1).

EPA was compelled to adopt its strained reading of the text of the Clean Air Act because it concluded, wrongly, that Congress had either deprived it of jurisdiction in more recent enactments, or has otherwise made clear to the agency that Congress, not EPA, should deal with climate change. None of the arguments the agency makes in support of this claim is sound.

1. Once *Brown & Williamson* is stripped away as authority for EPA's interpretation of section 202(a)(1), it becomes clear that the Court cannot reach EPA's desired result without effecting a repeal by implication, either through failed legislative proposals or subsequently enacted provisions of the Clean Air Act and other statutes. Here, too, EPA's reasoning reads like a list of anti-rules for statutory interpretation.

First comes EPA's invocation of failed legislative proposals. In its decision, EPA noted that when Congress amended the Clean Air Act in 1990, it did not enact the specific carbon dioxide emission limits then proposed. Pet.

---

[10] Section 202 includes protections designed to prevent severe economic impacts. *See, e.g.*, 42 U.S.C. 7521(a)(2).

App. A70-A71. EPA also cited several other legislative proposals that were not enacted. *Id.* at A70, A74-A75. EPA's basic argument is that because Congress was aware of the issue of climate change when it amended the Clean Air Act in 1990, its failure to enact proposals to regulate carbon dioxide signaled that it was "awaiting further information before deciding *itself* whether regulation to address global climate change is warranted and, if so, what form it should take." *Id.* at A75.

The statutory language showing that EPA has authority to regulate carbon dioxide and other air pollutants associated with climate change was in place before the 1990 Amendments, and indeed, before any of the failed legislative proposals EPA cited were developed. By the plain terms of the statute, EPA *already* possessed the authority to regulate greenhouse gases at the time of these proposals. EPA appears to think that subsequent *unenacted* legislation can amend prior *enacted* legislation. This Court has repeatedly rejected such an approach: "It is the intent of the Congress that enacted [the provision at issue], unmistakable in this case, that controls." *Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977). "Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" [11] *Solid Waste Agency of N. Cook County v. US Army Corps of Eng'rs*, 531 U.S. 159, 169-170 (2001); *see also Brown & Williamson*, 529 U.S. at 155 (disclaiming reliance on failed legislative proposals). "[C]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *United States v. Craft*, 535 U.S. 274, 287 (2002) (quoting *Cent. Bank of*

---

[11] EPA gains no more interpretive leverage from the failed legislative proposals it cites than petitioners could gain by citing the failed proposal to strip EPA of authority to regulate emissions of carbon dioxide (which cited EPA's position, at the time, that carbon dioxide was a "pollutant"). H.R. 2221, 106th Cong., §§ 3(b), 2(a)(2) (1999).

Denver v. First Interstate Bank of Denver, 511 U.S. 164, 187 (1994)).

EPA is also laboring under the misimpression that subsequently enacted legislation can silently undo previously granted authority, and can do so even when the two pieces of legislation can happily coexist. EPA cited provisions from the 1990 Amendments to the Clean Air Act (amendments enacted, as discussed, years after the language at issue here was settled upon) and from other legislation in asserting that Congress meant for EPA to take a strictly "nonregulatory" approach to climate change. Pet. App. A70-71, A74-A75 (citing sections 103, 602, and uncodified section 821 of the Act). Nothing in these provisions expressly or impliedly removes the authority granted by section 202(a)(1).[12]

In fact, as discussed above, one of the "nonregulatory" provisions EPA relied upon, section 103(g), *reinforces* the interpretation of the word "air pollutant" dictated by the plain text of section 302(g). By expressly including carbon dioxide in a list of enumerated "air pollutants," section 103(g) reaffirms that this climate-changing gas is an "air pollutant" under the Act.

Apart from these provisions in the Clean Air Act, Congress has since 1977 also enacted several statutes pertaining to global climate change.[13] Because such legislation principally

---

[12] Section 103(g) says only that "[n]othing *in this subsection* shall be construed to authorize the imposition on any person of air pollution control requirements." 42 U.S.C. 7403(g) (emphasis added). Likewise, section 602(e) directs EPA to "publish the global warming potential" of ozone-depleting substances designated for phase-out under the Act, and then states that "[t]he *preceding sentence* shall not be construed to be the basis of any additional regulation under this chapter." 42 U.S.C. 7671a(e) (emphasis added). Neither of these provisions utters a peep about section 202(a)(1).

[13] *See* National Climate Program Act of 1978, Pub. L. No. 95-367, 92 Stat. 601 (establishing a program to assist the nation in understanding and responding to climate change); Global Climate Protection Act of 1987, Pub. L. No. 100-204, Title XI, 101 Stat. 1331

called for further research and other "nonregulatory" measures, EPA concluded that these enactments demonstrate that Congress meant to withhold from EPA regulatory authority to address climate change. Pet. App. A74-A75. Once again, however, EPA did not—and, given the content of these statutes, could not—claim that these enactments erased its existing authority to regulate "air pollutants."[14]

In trying to snuff meaning out of 1970s legislation based on legislation of the 1980s and 1990s, EPA struggles uphill against the "cardinal rule . . . that repeals by implication are not favored." *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)). This is a venerable rule: this Court long ago declared that "[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." *In re Henderson's Tobacco*, 78 U.S. 652, 657 (1870). There being no inconsistency between the legislation cited by EPA and the clear application of section 202(a)(1) to air pollutants associated with climate change, it was error for EPA to find an implicit repeal of the latter in the former.

(requiring the President to develop a national policy on climate change); Global Change Research Act of 1990, Pub. L. No. 101-606, 104 Stat. 3096 (authorizing a comprehensive research effort); Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, Title XXIV, 104 Stat. 3359 (establishing a program to coordinate climate change research and policy within the Department of Agriculture); Energy Policy Act of 1992, Pub. L. No. 102-486, Title XVI, 106 Stat. 2776 (calling for an assessment of the feasibility of reducing greenhouse gases and creating a national inventory and voluntary reporting of greenhouse gas emissions).

[14] EPA's citation to congressional actions pertaining to climate treaty negotiations in the 1990s, Pet. App. A75, draws us even farther away from the meaning of the Clean Air Act provisions enacted in the 1970s. These actions did not mention, let alone limit, existing domestic regulatory authority. *See* 105 S. Res. 98, Rep. No. 105-54; Pub. L. No. 105-276, 112 Stat. 2461 (1998).

EPA's aim in citing the above "indicia of congressional intent"—failed proposals, and legislation enacted after the statutory text at issue here was in place—was to show that Congress intended to "learn more about the global climate change issue before specifically authorizing regulation to address it . . . ." Pet. App. A75. Apart from the problems already discussed, there are additional flaws in EPA's analysis.

First, EPA has ignored the fact that numerous provisions of the Clean Air Act have *explicitly* required EPA or other entities to "learn more about" an environmental issue and to report back to Congress with recommendations for legislation. *See, e.g.*, 42 U.S.C. 7412(f)(1)-(2) (requiring report to Congress on program regulating hazardous air pollutants, and contemplating further agency action only in the event Congress does not act on agency recommendations); 7412(r)(6) (directing Chemical Safety Board to report to Congress on accidental hazardous releases and to make recommendations). In addition, before the Motor Vehicle Air Pollution Control Act of 1965 created the first federal regulatory program for motor vehicle emissions, Congress had twice directed first the Surgeon General, and then the Secretary of Health and Human Welfare, to conduct research on the consequences of air pollution from motor vehicles and to report back to it with recommendations for legislation on the subject. Pub. L. No. 86-493, 74 Stat. 162 (1960); Pub. L. No. 88-206, 77 Stat. 392 (1963). If, in section 202(a)(1) of the Act, Congress had really wanted to create the kind of nonregulatory, report-and-wait program EPA envisions, it could easily have replicated the language of these other provisions, and tailored it to the issue of climate change. It did not do this.

Second, EPA's implicit suggestion that ongoing investigation cannot coexist with regulation is a frontal assault on a core tenet of the Act. Section 202 and other key sections of the Act call for EPA to take regulatory action against dangers to public health and welfare even when some scientific uncertainty remains. In light of this, simultaneous

regulation and further study is not incompatible; rather, it is the norm that Congress established under the Act. Research and regulation walk hand in hand under the Act, and thus calls by Congress for more research on a topic have naturally been paired with commands for regulation. *See, e.g.*, 42 U.S.C. 7409(a), (d) (providing for establishment of NAAQS and continuing research on the scientific basis of the standards); 42 U.S.C. 7412(d), (f)(1) (providing for technology-based regulation of hazardous air pollutants and continuing research into adequacy of this regulation in protecting public health); 42 U.S.C. 7521(a), 7548 (calling for regulation of air pollution from motor vehicles and study of effects on public health and welfare of particulate matter emissions from motor vehicles).

A third problem with EPA's mode of analysis is the idea that Congress must "*specifically* authoriz[e]" (Pet. App. A75 (emphasis added)) a regulatory program before EPA may act. This notion is at odds with the system created by the Clean Air Act. What EPA seems to mean is that Congress must say the words "carbon dioxide" or "greenhouse gases" in specific regulatory provisions of the Act before a regulatory program addressing these matters may be developed. This is not the way the statute works.[15] On the contrary, the Act does not attempt, in advance, to identify all of the possible targets of regulatory activity. Even where Congress has painstakingly listed pollutants to be regulated, it has also recognized that further research may identify additional harmful pollutants

---

[15] Nor is it the way most statutes work. *See, e.g., Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 475 (1989) (Kennedy, J., dissenting) (Congress "usually does not legislate by specifying examples, but by identifying broad and general principles that must be applied to particular factual instances"). In fact, this Court has consistently held that an agency may regulate a new subject matter in the absence of proof of specific congressional attention directed at the particular problem. *See, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 314-315 (1980) (rejecting argument that because genetic technology was unforeseen when broad patent statute was enacted, micro-organisms could not be patented until Congress expressly authorized it).

that should be brought into the regulatory fold. *See, e.g.*, 42 U.S.C. 7412(b)(1) (listing nearly 200 hazardous air pollutants to be regulated), 7412(b)(2) and (3)(B) (making way for additions to the list). In many other cases, Congress has identified the targets of regulation in general terms, leaving the details to be filled in by EPA. *See, e.g.*, 42 U.S.C. 7408(a) (criteria air pollutants); 7411(b)(1)(A) (stationary sources subject to New Source Performance Standards); 7545(c) (fuels and fuel additives).

One famous example of this framework in operation is EPA's reduction of the lead content of gasoline. The 1970 version of section 211 of the Clean Air Act authorized the Administrator to "control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products of such fuel or fuel additive will endanger the public health or welfare . . . ." Pub.L. No. 91-604, 84 Stat. 1676, § 211(c)(1). This provision did not mention the fuel additive lead. Despite the Act's lack of an explicit reference to leaded gasoline, EPA in 1973 ordered a dramatic reduction in the lead content of gasoline. 38 Fed. Reg. 33734 (1973). The agency later ordered still steeper reductions. 50 Fed. Reg. 9386 (1985). The decisions to phase down lead in gasoline were based on broadly worded statutory language that did not specifically grant EPA authority to regulate lead in gasoline. The decisions were also economically and politically momentous. Based on the interpretive method EPA offers for this case, the lead phase-down would have been doomed from the get-go.

2. In disclaiming authority to regulate air pollutants associated with climate change, EPA also pointed to two important programs under the Clean Air Act which the agency said would fit so uneasily with regulation of these pollutants that Congress could not have intended these pollutants to be regulated at all. These claims are meritless.

EPA asserted, first, that Congress's enactment in 1990 of Title VI of the Act (42 U.S.C. 7671-7671q), which regulates

chemicals that threaten the stratospheric ozone layer, "cautions against construing [the Act's] provisions to authorize regulation of emissions that may contribute to global climate change." Pet. App. A71. EPA stated that the enactment of Title VI "demonstrate[s] that Congress has understood the need for specially tailored solutions to global atmospheric issues." *Ibid.* Once again, EPA is seeking to use provisions enacted in 1990 to discern—and to limit—the meaning of provisions enacted in the 1970s. Moreover, EPA has used the very statutory program under discussion here—relating to stratospheric ozone depletion—as a basis for regulating air pollutants associated with climate change. *See* pages 33-34, *infra*.

In any event, EPA cannot seriously maintain that "coordination with the international community" is a prerequisite for regulating pollutants that "are emitted around the world and are very long-lived," the consequences of which "occur on a global scale." *Id.* at A71-A72. Congress directed EPA to regulate ozone-depleting substances themselves without awaiting such coordination.[16] In addition, EPA has recently issued a rule regulating mercury emissions. 70 Fed. Reg. 28606 (2005). Mercury is (to use EPA's words in describing greenhouse gases and ozone-depleting substances) a pollutant "emitted around the world" that is "very long-lived," and exerts effects "on a global scale." *See* 70 Fed. Reg. 15994, 16011, 16012 (2005) (mercury is "persistent," and there exists a "global [mercury] cycle").[17] Even so, the agency has not made domestic regulation of mercury await "coordination with the international community."

EPA's claim based on the NAAQS program is equally unsound. EPA concluded that the NAAQS system, created by sections 108-110 of the Act, 42 U.S.C. 7408-7410, is

---

[16] Pub. L. No. 95-95, 91 Stat. 685, § 126 (1977); 42 U.S.C. 7426.

[17] EPA has estimated that roughly 40 percent of the mercury deposited in the United States comes from sources in other countries. 65 Fed. Reg. 79825, 79827 (2000).

"fundamentally ill-suited to addressing [greenhouse] gases in relation to global climate change," and on this basis asserted that Congress did not intend EPA to regulate these pollutants under any part of the Act, including section 202. Pet. App. A73. EPA's move is a classic debater's trick: when you're losing the argument, change the subject.

The NAAQS program is an entirely separate program from the mobile source program at issue in this case. Nothing in the Act suggests that regulation under the mobile source program must stand or fall with regulation under the NAAQS program. The federal program for controlling air pollution from motor vehicles was first created in 1965, five years before the 1970 Act created the NAAQS program. The programs were not merged, and they retain significant independent status and effects. Organizationally, mobile sources are regulated under Title II of the Act, which is separate from Title I, concerning the NAAQS.[18] Moreover, while the federal government sets the NAAQS, the States are primarily responsible for implementing them, *see, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470 (2001), whereas the federal government sets the emission standards for mobile sources, and states have a more circumscribed role (with the exception that California may set its own standards, subject to certain constraints). 42 U.S.C. 7543(a), (b). Furthermore, the two programs cover different pollutants. For example, benzene and formaldehyde must be regulated under the mobile source program, 42 U.S.C. 7521(*l*)(2), but they are not regulated under the NAAQS program.

The NAAQS program and the mobile source program are also initiated by different regulatory triggers. Regulation of mobile sources is triggered under section 202(a)(1) by a determination that air pollution from motor vehicles "may reasonably be anticipated to endanger public health or

---

[18] *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[t]he NAAQS . . . are the engine that drives nearly all of *Title I* of the CAA . . . .") (emphasis added).

welfare." 42 U.S.C. 7521(a)(1). Although an endangerment decision of this kind is also a prerequisite to regulation under the NAAQS program, *see* 42 U.S.C. 7408(a)(1)(A), the NAAQS provision includes additional triggering language as well. *See, e.g.*, 42 U.S.C. 7408(a)(1) (requiring the Administrator to list new pollutants "for which he plans to issue air quality criteria"). Whether this provision would allow EPA to decline to set NAAQS for those substances it considers "ill-suited" to the program is not, however, before this Court.[19]

Whatever question exists about the applicability of the NAAQS program to the air pollutants at issue here cannot excuse the failure to adopt emission standards under section 202. Section 202 *does* provide a perfectly feasible mechanism for regulating emission of these pollutants from motor vehicles: the establishment of the same sort of limits on these pollutants that EPA has already imposed on pollutants such as carbon monoxide and hydrocarbons.

3. EPA also asserted that Congress has not authorized the agency to set standards for carbon dioxide emissions from motor vehicles to the extent that such standards would regulate fuel economy because such regulation would be inconsistent with the Energy Policy and Conservation Act (EPCA), 49 U.S.C. 32901-32919. Pet. App. A79-A80. EPCA,

---

[19] Nor has EPA demonstrated that it would be unworkable to apply the NAAQS to emissions of the chemicals at issue here. In other contexts, EPA has worked to craft implementation programs for long-range, troublesome pollutants such as ozone, assigning each state its fair share of reductions. *See, e.g., West Virginia v. EPA*, 362 F.3d 861 (D.C. Cir. 2004) (upholding regional program to address interstate ozone problems). Even if States were unable to devise implementation plans to achieve full compliance with NAAQS for the chemicals at issue here, should such NAAQS ever be set, this would not be an absurd result or one that ran counter to the purpose of the Act; it would at most be an *incomplete* result. In fact, Congress expressly recognized that there may be situations where a NAAQS cannot be attained due to emissions from foreign sources. 42 U.S.C. 7509a.

administered by the National Highway Traffic Safety Administration (NHTSA),[20] sets minimum corporate average fuel economy standards (or "CAFE" standards) for automobiles.[21] *See* 49 U.S.C. 32901-32919. EPA claimed that the only practical way to reduce carbon dioxide emissions from vehicles is to improve fuel economy, and that the care Congress exercised in creating a system for regulating fuel economy in EPCA demonstrated that EPCA was meant to be the only statutory vehicle for doing so. Pet. App. A79-A80. Here, EPA fundamentally misread the Clean Air Act and EPCA, and again violated sound principles of statutory interpretation.

The relevant provisions of EPCA and the Clean Air Act have fundamentally different purposes. EPCA's provisions were passed to promote energy efficiency, 42 U.S.C. 6201(5); the Clean Air Act provisions were passed to protect public health and welfare, 42 U.S.C. 7521(a)(1). The fact that in EPCA Congress created a system to strike a particular balance between energy conservation and other considerations has no bearing on the balance that Congress intended the EPA Administrator to strike if, in his judgment, he determined that carbon dioxide emissions from vehicles were endangering public health and welfare.

EPA's argument is premised on the assumption that the two provisions are inconsistent. They are not. While the two statutes may overlap, they are not irreconcilable, and manufacturers will be able to continue to comply with both statutes, as they have for decades. Regulatory overlap is common. *FTC v. Ken Roberts, Co.*, 276 F.3d 583, 593 (D.C. Cir. 2001) ("we live in 'an age of overlapping and concurring regulatory jurisdiction'") (quoting *Thompson Med. Co. v. FTC*,

---

[20] The Secretary of Transportation has delegated his responsibilities under EPCA to NHTSA. 49 C.F.R. 1.50(f).

[21] EPCA's fuel economy standards do not apply to other vehicles, such as heavy-duty trucks and motorcycles, 49 U.S.C. 32901(a)(3)(B), 32902(a), (b), and EPA did not argue that EPCA affects the agency's authority to regulate methane, nitrous oxide, or hydrofluorocarbons.

791 F.2d 189, 192 (D.C. Cir. 1986)). In cases of alleged conflict between two statutes, this Court has consistently held that both must be given effect wherever possible: "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also, e.g., J.E.M. AG Supply, Inc. v. Pioneer*, 534 U.S. 124, 143-44 (2001).

To be sure, many technologies employed to reduce carbon dioxide emissions may well result in consuming less fuel per mile of travel. These overlapping impacts are not inconsistent because the standards set pursuant to both Acts are minimum standards. *See* 42 U.S.C. 7521(a)(1); 49 U.S.C. 32901(a)(6), 32902. Because both statutes set minimum standards, an automobile manufacturer's compliance with one statute does not interfere with its compliance with the other.

Because of these potentially overlapping effects, the Clean Air Act and EPCA do refer to each other, but none of these cross-references limits EPA's authority; indeed, the two statutes reinforce each other. EPCA provides that when setting new fuel efficiency standards, NHTSA must take into account "the effect of other motor vehicle standards of the Government on fuel economy," 49 U.S.C. 32902(f), which include emissions standards under the Clean Air Act. Similarly, the Clean Air Act allows automobile manufacturers a limited waiver of certain emission standards for oxides of nitrogen if it would, among other things, enable greater fuel economy. *See* 42 U.S.C. 7521(b)(3)(C).[22] Far from being irreconcilable, therefore, these two statutes each recognize the goals and authority of the other. Congress expressly acknowledged that EPA is authorized under the Clean Air Act to set motor vehicle emission standards that could affect fuel

---

[22] Congress inadvertently included two subsections denominated "(b)(3)" in section 202. This provision is in the second of those.

economy, both positively and negatively.[23] Nothing in EPCA limits the circumstances under which EPA may set motor vehicle emission standards for air pollutants that cause or contribute to endangerment of the public health or welfare, just as nothing in the Clean Air Act undoes NHTSA's authority to address fuel efficiency.

C. EPA's interpretation deserves no deference.

Deference to EPA's interpretation is appropriate only if the statutory text is ambiguous and the interpretation is reasonable. *Chevron*, 467 U.S. at 842-844. As explained, the text is unambiguous. Even if it were not, however, EPA's interpretation deserves no deference because it is arbitrary and capricious. *Id.* at 844.

Making up one's mind first and then looking for reasons to support one's decision is the very soul of arbitrariness. Here, EPA backed into its conclusion that carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are not "air pollution agents" within the meaning of the Act by first reaching its substantive bottom line and then forcing that conclusion into the statutory text:

> . . . We thus conclude that the CAA does not authorize regulation to address concerns about global climate change.
>
> *It follows from this conclusion,* that GHGs, as such, are not air pollutants under the CAA's regulatory provisions, including sections 108, 109, 111, 112 and 202. . . . *Because EPA lacks CAA regulatory authority to address global climate change, the term 'air pollution' as used in the regulatory*

[23] This is also acknowledged in legislative history. For example, the House Report on the 1977 Clean Air Act Amendments relied on a National Academy of Sciences report that noted approvingly that some emission standards could assist in improving fuel economy and that "engine technologies which simultaneously reduce emissions and fuel consumption can and should be pursued." H.R. Rep. No. 95-294, at 247.

> *provisions cannot be interpreted to encompass global climate change*. Thus, CO_2 and other GHGs are not 'agents' of air pollution and do not satisfy the CAA section 302(g) definition of 'air pollutant' for purposes of those provisions.

Pet. App. A78 (emphasis added). If this is the way statutory interpretation works, EPA could also have declared that automobiles emitting carbon dioxide and other air pollutants associated with climate change are not "motor vehicles" within the meaning of the Act when they are emitting those chemicals. Once interpretation is unmoored from statutory language, as EPA has done, one can, like Humpty Dumpty, use words to mean whatever the user chooses them to mean.

EPA's decisionmaking regarding air pollutants associated with climate change is also capricious. EPA does not consistently apply the definition of "air pollutants" and "air pollution" it offers here. Indeed, EPA has regulated—as "air pollutants"—most of the chemicals at issue here. For example, the agency is requiring the monitoring of carbon dioxide emissions from nonroad equipment pursuant to section 103(a), 42 U.S.C. 7403(a), which authorizes research into "air pollution." 69 Fed. Reg. 12151 (2004).

In addition, EPA considers the global warming potential of proposed substitutes for ozone-depleting substances in evaluating those substitutes under provisions of the Clean Air Act addressing stratospheric ozone depletion. 59 Fed. Reg. 13044, 13049 (1994). EPA has ruled that the use of two hydrofluorocarbons[24] (HFC-134a and HFC-152a) in self-chilling cans is an unacceptable substitute for ozone-depleting substances, based entirely on these chemicals' global warming potential. 64 Fed. Reg. 10374, 10375 (1999); *see also, e.g.*, 64 Fed. Reg. 22982, 22984 (1999) (listing another substitute as unacceptable based in part on global warming potential). Section 618 of the Act specifically provides that requirements

---

[24] Hydrofluorocarbons are among the chemicals petitioners asked EPA to regulate.

concerning stratospheric ozone depletion are "requirements for the control and abatement of *air pollution*" within the meaning of sections 116 and 118 of the Act. 42 U.S.C. 7671q (emphasis added). EPA's assertion that "the term 'air pollution' as used in the regulatory provisions cannot be interpreted to encompass global climate change," Pet. App. A78, cannot be squared with its regulatory actions with respect to substitutes for ozone-depleting substances.

In addition, ten years ago, EPA added municipal solid waste landfills to the list of sources to be regulated under the Clean Air Act based on the Administrator's determination that these landfills met section 111's standard of endangerment. 61 Fed. Reg. 9905, 9905 (1996) (applying section 7411(b)(1)(A)). EPA included methane within "the emissions of concern" emanating from landfills, explaining: "Methane emissions *contribute to global climate change* and can result in fires or explosions when they accumulate in structures on or off the landfill site."[25] *Id.* at 9905 (emphasis added). Yet methane is one of the chemicals EPA has now said is not an "air pollutant" under the Act.

Thus, EPA regulates air pollutants associated with climate change as "air pollutants" under the Clean Air Act. It sometimes even does so *because* they are implicated in climate change. The agency was incorrect, therefore, when it stated that "GHGs are not 'agents' of air pollution and do not satisfy the CAA section 302(g) definition of 'air pollutant' for purposes of [the Act's regulatory] provisions." Pet. App. A78. What EPA should have said was that it will let us know when these chemicals are "air pollutants," and when they are not, based not upon the statutory text but upon the agency's own

---

[25] *See also* 63 Fed. Reg. 6426, 6454 (1998) ("The primary source of air pollution from landfills is due to the microbial breakdown of organic wastes from within the landfill. Landfills are known to be major sources of greenhouse gas emissions such as methane and carbon dioxide. These emissions are now regulated under the Clean Air Act as a result of the landfill New Source Performance Standards and Emissions Guidelines, promulgated by EPA on March 12, 1996.").

unpredictable amendments to the statutory text. This is not statutory adherence; it is statutory adhocism.

Even if the statutory language were ambiguous, which it is not, the ad-libbed interpretation EPA has offered in this case deserves no deference from this Court.

II. EPA MAY NOT DECLINE TO ISSUE EMISSION STANDARDS FOR MOTOR VEHICLES BASED ON POLICY CONSIDERATIONS NOT ENUMERATED IN SECTION 202(a)(1) OF THE CLEAN AIR ACT.

EPA's second legal error was to conclude that it could decline under section 202(a)(1) to regulate air pollutants associated with climate change on the basis of factors not enumerated in that provision. Even when an agency is declining to regulate, it may not depart from the unambiguous language of the statute in making its decision. *See, e.g., General Motors Corp. v. NHTSA*, 898 F.2d 165, 169-170 (D.C. Cir. 1990) (judicial review of denial of rulemaking petition is "guided by *Chevron* analysis").

A. The only relevant factor under section 202(a)(1) is whether air pollution from motor vehicles "may reasonably be anticipated to endanger public health or welfare."

The basic aim of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b). Thus, the trigger for much of the regulatory action that occurs under the Act is the endangerment of public health or welfare. For example, regulation of stationary sources such as factories and power plants (42 U.S.C. 7411(b)(1)(A)) and fuels and fuel additives (42 U.S.C. 7545(c)(1)) is triggered by a conclusion that air pollution from these sources "may reasonably be anticipated to endanger public health or welfare." Under the

Act's regulatory programs, myriad other factors (such as economic and technological feasibility) come into play in implementation, *see, e.g.*, 42 U.S.C. 7411(a)(1), but the initial stimulus for regulatory action is health- and welfare-based.

Section 202 of the Clean Air Act has the same structure. Section 202(a)(1) creates the "trigger" for regulatory action on pollution from motor vehicles. Section 202(a)(1) directs the EPA Administrator's attention to the question whether, "in his judgment," new motor vehicles or new motor vehicle engines "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). The statute states that the Administrator "shall" regulate air pollutants satisfying this criterion.

The other step in regulating air pollution from motor vehicles involves deciding exactly what the regulatory standard for the pollutant(s) in question should be, and when the standard should become effective. The bulk of section 202 is concerned with these kinds of questions. At that stage of regulatory decisionmaking, a range of factors beyond "endangerment" are relevant, including the time needed "to permit the development and application of the requisite technology," taking compliance costs into account, 42 U.S.C. 7521(a)(2), and the existence of "an unreasonable risk to public health, welfare, or safety" due to the "operation or function" of an emission control "device, system, or element of design," 42 U.S.C. 7521(a)(4)(A).

If any doubt remained as to whether Congress's singular focus on endangerment in section 202(a)(1) was intentional, perusal of other provisions in the Clean Air Act confirms that Congress carefully specified which factors are relevant, and which are not, to various agency decisions under the Act.[26] In

---

[26] *See, e.g.*, 42 U.S.C. 7545(c)(2)(B) (Administrator may not regulate fuel additive on account of its harm to vehicle emission control systems unless it first does cost-benefit analysis of such regulation); 42 U.S.C. 7411(a)(1), (b)(1) (for certain categories of new sources, Administrator must set "standards of performance," which take into

some cases, Congress explicitly allowed the agency to range beyond specifically enumerated factors, by winding up a list of statutorily relevant factors with open-ended language such as "among other factors," *see, e.g.*, 42 U.S.C. 7411(d)(2)(B), 7411(j)(1)(A)(iv), or "and other relevant factors," *see, e.g.*, 42 U.S.C. 7412(a)(1), 7412(f)(2)(A). Congress included no such unstructured authority in section 202(a)(1).

This Court has made plain that the courts' role in statutory interpretation begins, and often ends, with the statute's language. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (speaking for a unanimous Court, Justice Rehnquist observed: "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."). In trying to discern a statute's meaning, the Court has found it helpful—often decisive—to compare the language of the statutory provision in question with language found elsewhere in the statute: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).[27]

These principles are a hallmark of this Court's jurisprudence under the Clean Air Act. Where Congress has listed certain factors as relevant in one part of the Act, and not in another, this Court has consistently respected this

---

account cost and "any nonair quality health and environmental impact and energy requirements").

[27] *See also, e.g., Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

legislative choice. For example, in *Whitman v. American Trucking Ass'ns*, this Court held that the absence of any reference to costs in the provision specifying the criteria for NAAQS, 42 U.S.C. 7409(b)(1), and the numerous references to costs in other provisions of the Act, plainly precluded consideration of costs in setting the NAAQS. 531 U.S. at 465-468. In so ruling, the Court relied on *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976), where the Court had similarly held that where Congress identifies the factors an agency must consider in decisionmaking, the agency is not free to stray and consider additional factors of its choosing. *See id.* at 256-266 (EPA may not consider economic and technological infeasibility in deciding whether to approve States' plans for implementing the NAAQS). *See also General Motors Corp. v. United States*, 496 U.S. 530, 538 (1990) (in holding that the four-month time limit for EPA review of an original state implementation plan did not apply to plan revisions, Court observed: "[s]ince the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline" in the provision at issue).

In this case, EPA, along with the lead opinion in the D.C. Circuit, strayed from this well-marked path. The agency thought that it could decline to regulate emissions from new motor vehicles under section 202(a)(1) by invoking a mélange of factors not mentioned in that provision. Not so. An administrative agency cannot rest its decisions "on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). The provision under which EPA made its decision, section 202(a)(1) of the Clean Air Act, is crystalline: EPA is to decide whether to regulate an air pollutant emitted by motor vehicles on the basis of its judgment as to whether public health or welfare may reasonably be anticipated to be endangered by the pollution, not the grab bag of considerations EPA invoked in this case.

B. The policy judgments EPA cited in refusing to regulate air pollutants associated with climate change were irrelevant under section 202(a)(1) or failed to take account of the statutory endangerment standard.

Even if section 202(a)(1) did not so plainly rule out consideration of factors other than endangerment in the initial decision whether to regulate emissions from motor vehicles, the text and structure of the Clean Air Act make clear that three of the specific factors EPA did consider are irrelevant under this provision. EPA could appropriately consider a fourth factor, scientific uncertainty, but the agency failed to relate that factor to the statutory standard of endangerment.

EPA expressed concern that regulation under section 202(a)(1) would "result in an inefficient, piecemeal approach to addressing the climate change issue." Pet. App. A85. Section 202(a)(1) itself, however, embraces the very kind of approach EPA criticizes. It directs EPA to regulate motor vehicle emissions that "cause, or *contribute to*" air pollution that passes the endangerment threshold. 42 U.S.C. 7521(a)(1) (emphasis added). Congress used the same phrasing in directing EPA to set other standards under the Act. *See, e.g.*, 42 U.S.C. 7411(b)(1)(A) (stationary sources); 7545(c)(1) (fuels and fuel additives). Clearly, the Act endorses incremental responses to air pollution problems, rather than necessarily requiring all-encompassing solutions. EPA is free to propose a comprehensive solution to the problem of climate change if it wishes to do so, but it is not free to reject the approach Congress explicitly set forth in section 202(a)(1).[28]

---

[28] In addition, as a factual matter, it is hard to credit EPA's characterization of the approach it opposes as "piecemeal." Repeating the legal conclusion first announced in the decision at issue here, EPA has also refused to regulate carbon dioxide emissions from power plants and other stationary sources. 71 Fed. Reg. 9866, 9869 (2006). Together, mobile sources and power plants are responsible for more than 60 percent of the carbon dioxide emissions inventory in this country. *See* Energy Information

The same observation applies to EPA's suggestion that reduction of air pollutants associated with climate change in this country might be offset by increases of such air pollutants in other countries, and thus "climate change raises important foreign policy issues" which "it is the President's prerogative to address." Pet. App. A86. In enacting section 202(a)(1), Congress was clearly aware that emissions from mobile sources might not be the sole cause of an air pollution problem, yet it directed EPA to regulate even when they "contribute to" such a problem.[29] In other provisions of the Act, moreover, Congress specifically directed EPA to consider "emissions emanating from outside of the United States" in making regulatory decisions. *See* 42 U.S.C. 7509a; *see also* 7513(e). Congress gave no such direction to EPA in section 202(a)(1).[30]

EPA also expressed concern that technologies might not be available to control air pollutants associated with climate change emitted by motor vehicles. Pet. App. A87. This is, however, plainly not relevant to deciding whether the endangerment standard of section 202(a)(1) is met. As detailed in the previous section, the remainder of section 202 *does* direct EPA's attention to the availability of technology, but only once the agency has found endangerment.

Administration, Emissions of Greenhouse Gases in the United States 2004 at 22 (Dec. 2005) (describing carbon dioxide emissions of transportation and electric power sectors), available at http://www.eia.doe.gov/oiaf/1605/ggrpt.

[29] Tellingly, EPA has regulated mercury, a global pollutant, under the Act, *see* 70 Fed. Reg. 28606 (2005), despite the possibility that domestic reductions will be offset by increased emissions elsewhere.

[30] To the extent EPA hopes, with a glancing reference to "foreign policy issues" and "the President's prerogative," Pet. App. A86, to convince this Court to override the plain statutory text, its hope must prove forlorn. No principle of statutory construction or of constitutional law permits such an aggrandizement of executive authority.

The one factor mentioned by EPA that has anything to do with the endangerment standard of section 202(a)(1) is scientific uncertainty. However, as the lead opinion below expressly found, EPA did not rely solely on uncertainty in coming to its decision. Pet. App. A14-A15. Instead, it relied on uncertainty in combination with the other factors clearly having no relevance to the endangerment decision under section 202(a)(1). *Id.* at A82-A87. The consideration of statutorily excluded factors taints EPA's entire decision; we cannot know what EPA would have done if it had exercised its judgment in light of the only legally relevant consideration—endangerment of public health or welfare—and this Court cannot supply an answer EPA itself did not give. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 93-95 (1943); *State Farm*, 463 U.S. at 57.

Moreover, EPA failed to relate its discussion of scientific uncertainty to the statutory standard of endangerment. The existence of uncertainty is not a bar to regulation or an excuse for inaction.[31] An agency cannot defer action "while it awaits the Godot of scientific certainty." *Pub. Citizen Health Research Group v. Chao*, 314 F.3d 143, 156 (3d Cir. 2002) (Becker, J.) (quoting *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1266 (D.C. Cir. 1980)). Congress underscored this point in 1977 by amending section 202(a)(1) (and other key regulatory provisions of the Act) to require the Administrator to regulate emissions from motor vehicles which "in his judgment cause, or contribute to, air pollution which *may reasonably be anticipated* to endanger public health or welfare." Pub. L. No. 95-95, § 401, 91 Stat. 685, 791 (1977) (emphasis added); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 514 n. 12 (D.C. Cir. 1983) (discussing 42

---

[31] *Cf. Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 656 (1980) (plurality opinion) (stating that, in setting workplace standards for toxic substances, Occupational Safety and Health Administration was "not required to support its finding that a significant risk exists with anything approaching scientific certainty").

U.S.C. 7545(c)(1)). Previously, the Act had set regulation in motion based on the Administrator's judgment that any air pollutant from motor vehicles "causes or contributes to, or is likely to cause or contribute to, air pollution which endangers the public health or welfare." Pub. L. No. 91-604, § 6(a), 84 Stat. 1676, 1690 (1970). The textual change, from "endangers" to "may reasonably be anticipated to endanger," plainly signals that regulation of new motor vehicles is not to be eschewed merely because the relevant science is uncertain.[32]

EPA did not come close to applying this standard correctly in this case. EPA did not seriously engage with the scientific evidence indicating that the pollutants at issue here are changing the earth's climate, causing destructive present effects and laying the groundwork for even worse future ones.[33] Instead, EPA made do with a staccato listing of remaining uncertainties with respect to climate change. Pet. App. A82-A85. The centerpiece of its discussion was the 2001 National Research Council Report on climate change (issued after the comment period closed), from which EPA plucked the choicest concessions to scientific uncertainty. Yet nowhere did EPA address the overall thrust of the Report, which confirmed the scientific community's "current thinking" that "most of the observed warming of the last 50 years is likely to have been due to the increase in greenhouse

---

[32] In *Ethyl Corp. v. EPA*, 541 F.2d 1, 25 (D.C. Cir. 1976) (*en banc*), the court held that the earlier endangerment standard authorized "regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable." In 1977, Congress amended section 202(a)(1) "to support the views expressed" in *Ethyl*. H.R. Rep. 95-294 at 49. Specifically, "[i]n order to emphasize the precautionary or preventive purpose of the act (and, therefore, the Administrator's duty to assess risks rather than wait for proof of actual harm), the committee not only retained the concept of endangerment to health; the committee also added the words 'may reasonably be anticipated.'" *Id.* at 51.

[33] For detailed discussion of this evidence, see Brief of Amici Curiae Climate Scientists David Battisti, *et al.*

gas concentrations," that the accumulation of greenhouse gases is due to "human activities," and that "*[d]espite the uncertainties*, there is general agreement that the observed warming is real and particularly strong within the last 20 years." J.A. 151, 157, 158 (emphasis added). Imagine describing the scientific evidence of the risks of smoking by referring solely to language qualifying the conclusions in the Surgeon General's Reports on smoking and health, and excluding discussion of the evidence that smoking causes human disease. That is what EPA's discussion of the science of climate change is like.

Even with respect to the one factor relevant to determinations under section 202(a)(1), therefore, EPA blundered. Mere incantation of the words "scientific uncertainty," paired with terse and selective references to the state of the science, is not a substitute for the mature scientific inquiry plainly contemplated by section 202(a)(1).[34] Whether air pollutants associated with climate change may be reasonably anticipated to endanger public health or welfare "is a matter for the agency to decide, but it must bring its expertise to bear on the question." *State Farm*, 463 U.S. at 54.

---

[34] Of course, as Judge Tatel recognized, if scientific uncertainty was sufficient to prevent the Administrator from making a credible finding either of endangerment or non-endangerment, EPA could lawfully decline to regulate. Pet. App. A46, A48-A49 ("If the Administrator concludes based on substantial evidence that more research is needed before he can judge whether GHGs may reasonably be anticipated to endanger welfare, then he has discretion to hold off making a finding. . . . In short, EPA may withhold an endangerment finding only if it needs more information to determine whether the statutory standard has been met."). Here, however, the agency declined to regulate based on policy reasons; it never claimed that scientific uncertainty prevented it from determining whether the endangerment threshold had been crossed. *Id.* at A50 ("EPA never suggests that the uncertainties identified by the NRC Report prevent it from determining that GHGs 'may reasonably be anticipated to endanger' welfare.").

EPA's mistaken legal judgment about the requirements of section 202(a)(1) led it far afield from this basic principle.

C. Section 202(a)(1)'s reference to the Administrator's "judgment" does not give the Administrator unfettered discretion in deciding whether to regulate air pollution from motor vehicles.

In the crucial passage in his opinion announcing the judgment of the court of appeals, Judge Randolph found that the word "judgment" in section 202(a)(1) gave EPA the kind of discretion normally reserved for legislatures:

> In requiring the EPA Administrator to make a threshold "judgment" about whether to regulate, § 202(a)(1) gives the Administrator considerable discretion. Congress does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence. What the *Ethyl* court called "policy judgments" also may be taken into account. By this the court meant the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area.

Pet. App. A13 (citations omitted); *see also id.* at A80-A81 (explaining EPA's view of its discretion under section 202(a)(1)).

This interpretation of the phrase "in his judgment" must be rejected. Here again, the plain text of the statute supplies the answer. Section 202(a)(1) of the Clean Air Act states:

> The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. 7521(a)(1). A simple parsing of the language shows that the phrase "in his judgment" modifies the clause

describing causation and endangerment.[35] It does not qualify the whole of section 202(a)(1).

The phrase "in his judgment" performs two simple functions in this provision. First, it makes clear that decision-making authority under section 202 is lodged in the Administrator of the EPA, not in any other official. *Cf. Gonzales v. Oregon*, 126 S.Ct. 904, 916-922 (2006) (declining to defer to the Attorney General's interpretation of the Controlled Substances Act where the interpretation pertained to matters outside his statutory purview). Second, it makes clear that Congress recognized the substantial challenges that may attend determinations about air pollution and endangerment, and did not expect or desire the Administrator to adhere to any rigid or mechanistic scientific formula in making decisions under conditions of uncertainty.[36]

Under the ruling below, the phrase "in his judgment" – inserted in the middle of a statutory provision and clearly qualifying only part of it – would swallow the whole of section 202(a)(1). While it may be that in other contexts a nod to an administrative official's judgment would convey the kind of discretion contemplated by the lead opinion below, here the statutory context makes plain that "in his judgment" modifies

---

[35] *See also* H.R. Rep. No. 95-294 at 51 (1977) ("[T]he term 'in the judgment of the Administrator' is intended to modify both the 'cause or contribute to' phrase and the 'reasonably may be anticipated' phrase.").

[36] *See* H.R. Rep. No. 95-294 at 50-51 (1977) (describing House committee's decision, in crafting 1977 Amendments to the Act, to "use[] a standardized basis for future rulemaking to protect the public health: the Administrator may regulate a pollutant, emissions of 'which in his judgment cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare,'" and explaining that it would allow the Administrator "a substantial element of judgment, including making comparative assessment of risks, projections of future possibilities, establishing margins of safety and margins of error, extrapolating from limited data, etc.").

only the phrase following it, describing the scientific determination regarding endangerment. As this Court has counseled time and again,

> [t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. U.S. Postal Service, 126 S.Ct. 1252, 1257 (2006); *see also, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' we construe language in its context and in light of the terms surrounding it.").

By giving EPA wide-open discretion to decline to regulate, the lead opinion below also effectively converts the mandatory "shall" in section 202(a)(1) into a permissive "may." If Congress had meant "may," it could have written "may," just as it did in giving the Administrator the authority to regulate fuels and fuel additives.[37] But that is not what Congress did.

The conclusion that the phrase "in his judgment" does not give the agency freewheeling discretion is bolstered by consulting the many other provisions in the Clean Air Act that use this same phrase. In numerous instances, the Act includes the phrase "in his judgment" (or "in the Administrator's judgment") when it directs the Administrator to make a scientific determination that is a condition precedent to regulation or other administrative action.[38] Congress's use of

---

[37] 42 U.S.C. 7545(c)(1) ("The Administrator *may* . . . control or prohibit the manufacture . . . of any fuel or fuel additive . . . if in the judgment of the Administrator any emission product of such fuel or fuel additive causes, or contributes, to air pollution which may reasonably be anticipated to endanger the public health or welfare . . . .") (emphasis added).

[38] *See, e.g.*, 42 U.S.C. 7408(a)(1)(A) (listing criteria pollutants); 7409(b)(1)-(2) (setting primary and secondary NAAQS);

the phrase "in his judgment" in so many critical provisions of the Act shows the danger in the radical interpretation of that term endorsed by the lead opinion below. If mere reference to the "judgment" of the Administrator gives the agency license not to regulate—or to regulate—based on the Administrator's undisciplined sense of whether it "makes sense to regulate," Pet. App. A81, then many of the Act's most important provisions become blank canvases for the Administrator to paint as he wishes. This is not what the statute says, and it is not consistent with this Court's continued admonitions that statutes must give some direction to agencies about how they are to implement the statutes they are charged with administering. *American Trucking*, 531 U.S. at 475.[39]

The lead opinion's sweeping view of the phrase "in his judgment" also has the potential to disrupt other statutory regimes. Numerous federal statutes direct an administrative official or agency to prescribe regulations when specific statutory criteria are, according to the official or agency's "judgment," met.[40] If, as the opinion below suggests, mere

---

7411(b)(1)(A) (listing stationary sources subject to New Source Performance Standards (NSPS)); 7411(h)(1) (setting NSPS); 7412(h)(1) (setting standards for hazardous air pollutants); 7545(c)(1) (regulating fuels and fuel additives); 7547(a)(3)-(4) (setting standards for nonroad engines and vehicles); 7671n (regulating ozone-depleting substances).

[39] In *American Trucking*, this Court held that section 109(b), 42 U.S.C. 7409(b), allows consideration only of effects on public health and welfare when EPA sets the NAAQS, and precludes consideration of other factors such as cost. 531 U.S. at 464-471. Yet under the approach adopted by the lead opinion below, the reference to "judgment" in section 109(b) of the Act would broadly authorize consideration of "the sort of policy judgments Congress makes." Pet. App. A13. This approach is completely at odds with this Court's more modest statement of the agency's discretion in *American Trucking*.

[40] *See, e.g.*, 33 U.S.C. 601 ("[i]t shall be the duty" of the Secretary of the Army to issue regulations regarding use and administration of reservoirs at the head of the Mississippi River, as, in his judgment,

inclusion of the word "judgment" in a statutory provision is enough to transform it into "a discretionary exercise," Pet. App. A80, then these many other statutory provisions become empty vessels for the agencies to fill (or not) as they please.

Indeed, the approach taken in the lead opinion below mocks the very process of judicial review. The purpose of judicial review is not well served when courts approve agency action with reasoning that reads like Alexandre Dumas's famous *carte blanche*: "It is by my order and for the good of the state that the bearer of this has done what he has done."

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

---

public necessity and interest require); 42 U.S.C. 300g-1(b)(2)(B) (EPA Administrator may regulate drinking water contaminants not listed in regulatory schedules if, in his judgment, regulation of them "is more likely to be protective of public health"); 42 U.S.C. 2156a (Nuclear Regulatory Commission "shall" issue regulations setting levels of physical security "which in its judgment will provide adequate protection" for nuclear facilities and material "taking into consideration variations in risks to security as appropriate").

Respectfully submitted,

THOMAS F. REILLY
Attorney General of Massachusetts

LISA HEINZERLING
Special Assistant Attorney General
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9115

JAMES R. MILKEY*
WILLIAM L. PARDEE
CAROL IANCU
Assistant Attorneys General
1 Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200
**Counsel of Record*

August 31, 2006

BILL LOCKYER
Attorney General of California
MARC N. MELNICK
NICHOLAS STERN
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
(510) 622-2133

G. STEVEN ROWE
Attorney General of Maine
GERALD D. REID
Assistant Attorney General
State House Station #6
Augusta, ME 04333-0006
(207) 626-8545

RICHARD BLUMENTHAL
Attorney General of Connecticut
KIMBERLY MASSICOTTE
MATTHEW LEVIN
Assistant Attorneys General
P.O. Box 120
55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

ZULIMA V. FARBER
Attorney General of New Jersey
STEFANIE A. BRAND
KEVIN P. AUERBACHER
LISA MORELLI
Deputy Attorneys General
Richard J. Hughes Justice Complex
25 Market St., P.O. Box 093
Trenton, NJ 08625-0093
(609) 633-8713

LISA MADIGAN
Attorney General of Illinois
MATTHEW J. DUNN
GERALD T. KARR
Assistant Attorneys General
188 West Randolph Street
20th Floor
Chicago, IL 60601
(312) 814-3369

PATRICIA A. MADRID
Attorney General of New Mexico
STUART M. BLUESTONE
Deputy Attorney General
STEPHEN R. FERRIS
JUDITH ANN MOORE
Assistant Attorneys General
P.O. Drawer 1508
Sante Fe, NM 87504-1508
(505) 827-6010

ELIOT SPITZER
Attorney General
of New York
CAITLIN J. HALLIGAN
Solicitor General
PETER LEHNER
J. JARED SNYDER
Assistant Attorneys General
120 Broadway
New York, NY 10271
(212) 416-8016

WILLIAM H. SORRELL
Attorney General of Vermont
KEVIN O. LESKE
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-6902

HARDY MYERS
Attorney General of Oregon
PHILIP SCHRADLE
Special Counsel to the
Attorney General
RICHARD WHITMAN
Assistant Attorney General
Oregon Dept. of Justice
1162 Court Street, N.E.
Salem, OR 97301
(503) 378-6002

ROB MCKENNA
Attorney General of
Washington
LESLIE R. SEFFERN
Assistant Attorney General
JAY D. GECK
Deputy Solicitor General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-4613

PATRICK C. LYNCH
Attorney General
of Rhode Island
TRICIA K. JEDELE
Special Assistant Attorney
General
150 South Main Street
Providence, RI 02903
(401) 274-4400

ROBERT J. SPAGNOLETTI
Attorney General of the
District of Columbia
TODD S. KIM
Solicitor General
441 Fourth Street, N.W.
6th Floor South
Washington, D.C. 20001
(202) 724-6609

MALAETASI M. TOGAFAU
Attorney General
of American Samoa
P.O. Box 7
Pago Pago, American Samoa
96799
011 (684) 633-4163

JULIE TEEL
P.O. Box 7745
San Diego, CA 92167
(619) 224-3400

Counsel for Center for
Biological Diversity

MICHAEL CARDOZO
Corporation Counsel
City of New York
SUSAN KATH
SCOTT PASTERNACK
TRACY TRIPLETT
Assistant Corporation Counsel
100 Church Street
New York, NY 10007
(212) 676-8517

JOSEPH MENDELSON III
660 Pennsylvania Ave. SE
Washington, DC 20003
(202) 547-9359

Counsel for International
Center for Technology
Assessment, Center for Food
Safety, Environmental
Advocates, and Greenpeace

RALPH S. TYLER
City Solicitor
City of Baltimore
WILLIAM PHELAN, JR.
Principal Counsel
Baltimore City Dept. of Law
100 Holliday Street
Baltimore, MD 21202
(410) 396-4094

JOSEPH MENDELSON III
660 Pennsylvania Ave. SE
Washington, DC 20003
(202) 547-9359

Counsel for International
Center for Technology
Assessment, Center for Food
Safety, Environmental
Advocates, and Greenpeace

SETH KAPLAN
62 Summer Street
Boston, MA 02110
(617) 850-1721

Counsel for Conservation Law Foundation

JAMES B. TRIPP
257 Park Avenue South
17th Floor
New York, NY 10010
(212) 505-2100

Counsel for Environmental Defense

BRIAN DUNKIEL
Shems Dunkiel Kassel & Saunders PLLC
91 College Street
Burlington, Vermont 05401
(802) 860-1003

DANIELLE FUGERE
311 Calif. St., Ste. 510
San Francisco, CA 94104
(415) 544-0790

Counsel for Friends of the Earth

JOHN M. STANTON
1200 18th Street, N.W.
Washington, DC 20036
(202) 887-8800

Counsel for National Environmental Trust

DAVID DONIGER
1200 New York Ave., NW
Washington, DC 20005
(202) 289-2403

Counsel for Natural Resources Defense Council

DAVID BOOKBINDER
408 C Street, NE
Washington, DC 20002
(202) 548-4598

HOWARD FOX
1625 Massachusetts Ave., NW, Suite 702
Washington, DC 20036
(202) 667-4500

Counsel for Sierra Club

ALEXANDRA SCHULTE
1707 H St., N.W. Suite 600
Washington, DC 20006
(202) 223-6133 x 109

Counsel for Union of Concerned Scientists

ALEX FIDIS
218 D Street, SE
Washington, DC 20003
(202) 546-9707

Counsel for U.S. Public Interest Research Group